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ABSTRACT

The paper discusses the legal, political status of American Indian tribes, the relationship of Indians to their tribes and to their States, and the relationship of tribes to the States and to the United States (U.S.) Government. The U.S. Government has excercised plenary power over Indians for approximately 200 years. Indian tribes have traditionally been viewed by Federal courts as dependent or tributary nations possessed of limited elements of sovereignty and requiring Federal protection. Congress has alternatively viewed tribes as sovereign political entities or as anachronisms which must eventually be extinguished. The result has been 2 conflicting Federal policies--separation and assimilation. The Indian Citizenship Act of 1924 made all Indians born in the U.S. citizens of the U.S. As such, they are also citizens of the State in which they live, even though they may reside on a reservation. Indians are therefore citizens of 3 separate political entities, subject to Federal laws, civil and criminal laws of the tribe when they are on the reservation and within its jurisdiction, and State laws while off the the reservation. This document presents a general study of the constitutional status of Indians, rather than a complete analysis of the unique and complex field of Federal Indian law. (FF)

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

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STAFF MEMORANDUM

CONSTITUTIONAL STATUS OF AMERICAN INDIANS

INTRODUCTION

A thorough treatment of the constitutional status of American Indians would involve a complete analysis of the unique and complex field of Federal Indian law which cannot be adequately described merely by reference to the numerous treaties, statutory enactments of Congress, and court decisions or Federal administrative decisions.[1/] The legal and political status of Indian tribes, the relationship of Indians to their tribes and to their States, and the relationship of tribes to the States and to the United States Government have long been issues of controversy. Tribes have traditionally been viewed by Federal courts as dependent or "tributary" nations possessed of limited elements of sovereignty and requiring Federal protection.[2/]

1/ Felix Cohen's Handbook of Federal Indian Law, 1945, listed the existence of 4,264 separate statutes having application to American Indians.

2/ See Worcester v. Georgia, 31 U.S. 350 (1832).

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Congress has alternatively viewed tribes as sovereign political entities or as anachronisms which must eventually be extinguished. The result has been two conflicting Federal policies--separation and assimilation, one designed to protect Indians from the rest of society and to leave them with a degree of self-government within their own institutions, and the other calculated to bring Indians within the mainstream of American life by terminating special Federal trust relationships and Federal programs and services. Termination reached its aegis during the Eisenhower Administration of the 1950's. The current Administration has taken a strong stand against termination; in his message on Indian affairs, July 13, 1970, President Nixon said:

> Because termination is morally and legally unacceptable, because it produces bad practical results and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new concurrent resolution which would expressly renounce, repudiate and repeal the termination policy as expressed by the house Concurrent Resolution 108 of the 83rd Congress. This resolution would explicitly affirm the integrity and rights to continued existence of all Indian tribes and Alaskan Native governments, recognizing that cultural pluralism is a source of national strength. It would assure these groups that the United States Government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable. [It would] affirm for the Executive Branch..that the historic relationship between the Federal Government and the Indian communities cannot be abridged without the consent of the Indians.

Sources of Federal Power:

The historic relationship to which the President refers has a somewhat confusing background. The Federal Government has exercised plenary power over Indians for almost 200 years. This power emanates from three sources.[3/] First, the Constitution grants to the President and to Congress[4/] what have been construed as broad powers of authority over Indian affairs. Second, the Federal courts have applied a theory of guardianship and wardship to the Federal Government's jurisdiction over Indian affairs.[5/] And, finally, Federal authority is inherent in the Federal Government's ownership of the land which Indian tribes occupy.[6/] In Worcester v. Georgia, Chief Justice John Marshall recognized that the afforementioned powers plus the power of war and peace "comprehend all that is required for the regulation of our intercourse with the Indians."[7/]

The treaty power was the traditional means for dealing with Indian tribes from the colonial times until 1871, when recognition of Indian tribes as sovereign nations for this purpose was withdrawn

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3/ Art. II, Sec. 2, Cl. 2: "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties ...."

4/ Art. I, Sec. 8, Cl. 3: "Congress shall have power ...to regulate commerce with foreign nations, and among the several States, and with the Indian tribes...."

5/ See Cherokee Nation v. Georgia, 30 U.S. 1 (1831); United States v. Kagama, 118 U.S. 375, 383-84 (1886).

6/ See comment, the Indian Battle for Self Determination, 58 Cal. L.R. 445 (1970).

7/ 31 U.S. 350 (1832).

by the Indian Appropriation Act, which provided that "...hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty..."[8] Treaties made before 1871 were not nulified by that Act, but remain in force until superceded by Congress. It is a well established principle of constitutional law that treaties have no greater legal force or effect than legislative acts of Congress, and may be unilaterally abrogated or superceded by subsequent Congressional legislation.[9] Until so abrogated, however, treaties with Indian tribes are part of the law of the land and are binding on the Federal Government. In carrying out its treaty obligations the Federal Government occupies a trust relationship which, according to the Court in Seminole Nation v. United States, "should be judged by the most exacting fiduciary standards."[10] As part of the law of the land treaties cannot be annulled in their effect or operation by the acts of State governments.[11]

TRIBAL SOVEREIGNTY

In considering the constitutional status of American Indians a distinction must be made between tribal entities and individual citizens. As stated before, the legal status of Indian tribes has

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8/ 16 stat. 566, 25 U.S.C. 71.

9/ See cases cited in notes 3, 4, and 5, Federal Indian Law, supra, p. 25.

10/ 316 U.S. 286 (1942).

11/ 41 Am. Jur. 2d, § 11, p. 840.

vacillated throughout this Nation's history in the eyes of the Federal Government. The numerous treaties made with Indian tribes recognized them as governments capable of maintaining diplomatic relations of peace and war and of being responsible, in a political sense, for their violation. When engaged in war against whites, Indians were never treated as rebels, subject to the law of treason, but, "on the contrary, were always regarded and treated as separate and independent nations, entitled to the rights of ordinary belligerents and subject to no other penalties."[12/] Hostile Indians surrendering to armed forces were subject to the disabilities and entitled to the rights of prisoners of war.[13/]

Tribal sovereignty was originally formally recognized by Chief Justice Marshall in Worcester v. Georgia: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties."[14/] That position, which determined the Federal Judiciary's basic policy toward Indian tribes throughout the 19th century may be contrasted with the attitude of later court decisions such as Montoya v. United States[15/], wherein the

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12/ Ke-Tuc-e-mun-guah v. McClure, 122 Ind. 541, 23 N.E. 1080 (1890).

13/ Federal Indian Law, supra, p. 469.

14/ Supra at page 379.

15/ 180 U.S. 261 (1901).

court concluded that "the word 'nation' as applied to the uncivilized Indians was little more than a compliment."

Today, the concept of tribal sovereignty is widely misunderstood and can only be meaningfully discussed with regard to specific attributes or powers. Clearly, tribal governments are not on the same legal footing as independent nations; on the other hand, they are widely recognized as political units with governmental powers which exist, in some sense, on a higher level than that of the States. The contemporary meaning of tribal sovereignty is defined in Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation[16/] as follows:

> It would seem clear that the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as quasi-sovereign entities possessing all the inherent rights of sovereignty except where restrictions have been placed thereon by the United States, itself.

In his 1940 edition of Federal Indian law, Felix Cohen summarized the meaning of tribal sovereignty in the following manner:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles:
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> (1) The Indian tribe possesses, in the first instance, all the powers of any sovereign state.
>
> (2) Conquest renders the tribe subject to the legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not, by itself, affect the internal sovereignty of the tribe, i.e., its power of local self-government.

16/ 231 F. 2d 89, 92 (1956).

(3) These powers are subject to qualification by treaties and by express legislation by Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. 17/

POWERS OF TRIBAL SELF-GOVERNMENT

Indian tribes are recognized in Federal law as distinct political communities with basic domestic and municipal functions. This includes the power to adopt and operate under a form of government of the tribe's choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritence, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by tribal legislation, to administer justice and provide for the punishment of offenses committed on the reservation. 18/ Although Indian tribes began their relationship with the Federal Government as sovereign governments recognized as such by treaties and in legislation, the powers of tribal sovereignty have been limited from to time by the Federal Government. It should be noted, however, that the powers which tribes currently exercise are not delegated powers granted by Congress but rather, are "inherent powers of a limited dependent sovereignty which had not been extinguished by Federal action. What is not expressly limited often remains within the domain of tribal sovereignty simply because State

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17/ Federal Indian Law (1940 ed.) p. 123.

18/ Federal Indian Law, supra, p. 395.

jurisdiction is Federally excluded and governmental authority must be found somewhere. That is a principal to be applied generally in order that there shall be no general failure of governmental control."[19/]

The powers of self-government are normally exercised pursuant to tribal constitutions and law and order codes. Normally, these powers include the right of a tribe to define the authority and the duties of its officials, the manner of their appointment or election, the manner of their removal, and the rules they are to observe.[20/] This right, as with the exercise of all functions of tribal sovereignty, is subject to Congressional change. For example, Federal law has removed from some tribes the power to choose their own officials and has placed the power of appointment in the President and the Secretary of Interior.[21/]

Indian tribes, having the power to make laws and regulations essential to the administration of justice and the protection of persons and property also have the power to maintain law enforcement departments and courts to enforce them.[22/] Some smaller tribes have no

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19/ Federal Indian Law, supra, p. 396.

20/ Ibid, at 403.

21/ See Act of June 7, 1897, 30 stat. 62, 84.

22/ See Colliflower v. Garland, 342 F. 2d 369 (1965).

courts at all or maintain very traditional customary courts which lack formal structure. Larger tribes, such as the Navajo, maintain quite advanced law and order systems with well-equipped police departments, modern tribal codes and a hierarchy of trial and appellate courts overseen by a tribal supreme court. Generally, the jurisdiction of Indian courts is exclusive as to matters involving tribal affairs,[23] civil suits brought by Indians or non-Indians against tribal members arising out of matters occurring on the reservation,[24] and the prosecution of violations of the tribal criminal code.[25] Tribal jurisdiction operates to the exclusion of Federal and State authority. Federal courts are without jurisdiction over matters involving violations of tribal ordinances,[26] as are State courts.[27] With regard to cases within their jurisdiction, tribal courts are courts of last resort. Their decisions are appealable to neither State or Federal courts.

Several important limitations have been placed by Congress on tribal jurisdiction. Under the 1968 Indian Civil Rights Act[28] tribes may not exercise jurisdiction over criminal offenses punishable by

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23/ Little v. Nakai, 344 F. 2d 486, cert. den. 382 U.S. 986 (1965).

24/ Williams v. Lee, 358 U.S. 217 (1958).

25/ Colliflower v. Garland, supra.

26/ Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (1959).

27/ 41 Am. Jur. 2d, § 66, p. 869.

28/ 25 U.S.C. 1301, et. seq.

more than a $500 fine or 6 months in jail. Federal courts have jurisdiction to try and punish certain major offenses such as murder, manslaughter, rape, etc., pursuant to the Major Crimes Act.[29] In certain instances, Congress has provided that the criminal laws and/or civil laws of a State shall extend to Indian reservations located in the State.[30] States which have assumed responsibility for the administration of justice on Indian land are commonly referred to as "Public Law 280 States."

Hunting and Fishing Rights

A current major issue arising from the limitations on State authority due to quasi-tribal sovereignty is the hunting and fishing rights controversy in the Northwest. It is well settled that a State cannot enforce its game and fish laws within the boundaries of an Indian reservation.[31] However, the issue of State control over on-reservation hunting and fishing should be distinguished from the question of the extent to which treaty rights prohibit States from interfering with hunting and fishing by Indians off reservations. In a confusing decision the United States Supreme Court recently held that treaty rights to "fish at all usual and accustomed places" may not be qualified by a State but that the exercise of such rights is subject to reasonable State conservation legislation.[32]

29/ 18 U.S.C. 1153.

30/ 28 U.S.C. 1360.

31/ Pioneer Packing Company v. Winslow, 159 Wash. 655, 294, p. 557.

32/ Puyallup Tribe v. Department of Game, 391 U.S. 392 (1970).

Domestic Relations:

Indian tribes exercise a wide latitude of power over the domestic relations of tribal members. Tribes normally conduct marriages and grant divorces[34/] to the exclusion of State law even though the Indians concerned are also citizens of the State. Indian customary marriage and divorce has generally been recognized by State and Federal courts.[35/] Tribes also have complete and exclusive authority to define and punish offenses against the marriage relationship, although, as with other civil matters, Congress may make State law applicable.

Taxation:

An important power essential to the maintenance of governmental functions is the power of taxation. In Buster v. Wright,[36/] it was held that the Creek Nation had the power to impose a license fee upon all persons, Indian and non-Indian, who traded within the borders of that Nation. Tribal authority to levy a property tax on all property within the reservation was upheld in Morris v. Hitchcock.[37/] Indian tribes are currently recognized by the United States as "units of local government" for the purpose of receiving Federal revenue funds pursuant to the Revenue Sharing Act of 1972.

34/ Marris v. Sockey, 170 F. 2d 599 (1948).

35/ See Note, 13 Yale L.J. 250 (1904).

36/ 135 F. 947 (1905).

37/ Morris v. Hitchcock, 21 app. D.C. 565 (1903).

As a general matter, then, Indian tribes are recognized by Federal law as governmental units exercising a wide variety of governmental functions, limited only by the assertion of Congressional plenary power over Indian affairs. Outside of the scope of this memorandum is a discussion of the wide spectrum of Federal administrative powers currently exercised over Indian affairs.

LEGAL STATUS OF INDIAN INDIVIDUALS

By virtue of the Indian Citizenship Act of June 2, 1924, all Indians born in the United States are citizens of the United States. As such, they are also citizens of the State in which they live, even though they may reside on a reservation.[38/] Although many Indians acquired citizenship prior to 1924, pursuant to various Federal statutes, it was early held that the provision of the 14th Amendment of the United States Constitution conferring citizenship on "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" did not confer citizenship on Indians.[39/] State and Federal citizenship and tribal membership are not incompatable;[40/] Indians are citizens of three separate political entities. As citizens of the Federal Government they are subject to the laws of the Federal Government no matter where they may be located. As citizens of the tribal government they are subject to the civil and criminal laws of the tribe

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38/ Acosta v. San Diego County, 146 Cal. app. 2d 455, 474 p. 2d 92; Deere v. New York (D.C. N.Y.) 22 F. 2d 851 (1927).

39/ Smith v. United States, 151 U.S. 50, 38 (1894)

40/ Halbert v. United States, 283 U.S. 753, 762-763 (1931).

when they are on the reservation and within its jurisdiction (except, as stated above, in Public Law 280 States). They are subject to the laws of the States while off the reservation.

Protections in the Tribal Setting-Constitutional Immunity:

In their relationship with the tribe, Indians are normally protected by a wide variety of criminal due process, civil rights and civil liberties protections contained in the tribal constitution and the tribal law and order code. By their own weight the Bill of Rights and the 14th Amendment to the United States Constitution do not impose limitations on tribal action and thus, do not confer protections on tribal members. In the case of Talton v. Mayes[41/] for example, the Supreme Court refused to apply the Fifth Amendment to invalidate a tribal law that established a five-man grand jury. In Glover v. United States,[42/] the court stated that "the right to be represented by counsel is protected by the Sixth and 14th Amendments. These Amendments, however protect...this right only as against action by the United States in the case of the...Sixth Amendment...and as against action by the States in the case of the 14th Amendment, Indian tribes are not States within the meaning of the 14th Amendment." Again, in the case of Native American Church v. Navajo Tribal Council[43/] it was held by implication that

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41/ 163 U.S. 376 (1896).

42/ 219 F. Supp. 19, 21 (1963).

43/ 272 F. 2d 131, 10th Cir. (1959).

a tribal Indian cannot claim protection against illegal search and seizure by tribal officials. In 1954, an attempt to redress tribal invasions of religious freedom arose in a suit against the Jemez Pueblo Tribal Council and governor by Pueblo members, charging that they had been subjected to indignities, threats and reprisals solely because of their Protestant faith and that the tribal council had refused to permit them to bury their dead in the community cemetary and to build a church on tribal land. 44/ The court acknowledged that the alleged acts represented a serious invasion of religious freedom but concluded that the acts were not taken "under color of any statute, ordinance, regulation, custom or usage of any State or Territory" and thus no cause of action arose either under the Federal Constitution or under Federal civil rights acts. In State v. Big Sheep, 45/ the Tenth Circuit refused to concede the application of First Amendment protections through the Fourteenth Amendment to Indian tribes:

> No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious workship. 46/

44/ Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.M. Mex. (1954)).

45/ 272 F. 2d 131 (1962).

46/ 272 F. 131, p. 135.

1968 Indian Bill of Rights:

These cases illustrate what the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary saw as a "continued denial of Constitutional guarantees" to American Indians, on the ground that tribes are quasi-sovereign entities to which general provisions of the Constitution do not apply. In 1961 that Subcommittee instituted a lengthy investigation of the legal status of American Indians and the problems they encounter when asserting their Constitutional rights in their relations with the State, Federal and tribal governments. This effort, largely engineered by Senator Sam Ervin, Chairman of the Subcommittee, culminated in the passage of the Civil Rights Act of 1968,[47/] Title II of which constitutes a bill of rights for American Indians. It provides that Indian tribes exercising powers of self-government shall be subject to many of the same limitations and restraints which are imposed on Federal, State and local governments by the United States Constitution. Two major exceptions are that the Indian Bill of Rights provides the right to counsel before tribal courts only at the defendant's "own expense" and, although, religious freedom is protected, the Act does not contain a prohibition against the establishment of religion by a tribal government.

Rights and Privileges of State Citizenship:

While off their reservations, Indians are subject to the same laws, both Federal and State, as are other citizens. When brought before State or Federal courts they are entitled to the same Constitutional protections as other defendants. As a general matter, Indians

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47/ Public Law 90-284; 25 U.S.C. 1301, et. seq.

are also entitled to the same Federal and State benefits, programs and services as other State and Federal citizens. From time to time, however, States have attempted to deny Indians participation in State programs on the grounds that their entitlement to special Federal programs made them ineligible. A law of the State of California for example, declared that a local public school board could exclude Indian children from attending if the United States Government maintained a school for Indians within the school district. The California Supreme Court held that the law violated the State and Federal constitutions.[48/]

One justification commonly used by States for excluding Indians from participation in State programs and State services has been that Indians do not pay taxes. The restricted status of Indian land renders it immune from State and local taxation and, with certain statutory exceptions, income derived from the land is likewise nontaxable. Other local, State and Federal taxes commonly paid by citizens, including sales taxes, are paid by Indians. Indians pay State taxes on all nontrust property and are obligated for all fees and taxes for the enjoyment of State privileges, such as driving on State highways, and all other taxes which reach the entire population.[49/]

48/ Piper v. Big Pines School District, 193 Cal. 664, 226 pac. 926 (1924).

49/ See memorandum, Solicitor for the Department of Interior, April 22, 1936, holding that the Social Security Act was applicable to Indians.

All attempts to treat Indian citizens differently or to exclude them from State and local programs raise clear Constitutional questions. As the Chief Counsel of the Bureau of Indian Affairs stated in a memorandum dated July 8, 1953, concerning the refusal of the State of North Dakota to admit and care for feebleminded Indian children in State schools under the same rules and conditions applicable to the admission and care of non-Indians, "such refusal [by the State] to treat Indians in the same manner as non-Indians would appear to deprive the Indians of equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution."

Wardship:

There has been some confusion regarding the status of American Indians because of the common notion that Indians are "wards" of the Federal Government. The Federal Government is a trustee of Indian property, not the guardian of individual Indians. In this sense, the term "ward" is inaccurate. Indians are subject to a wide variety of Federal limitations on the distribution of property and assets and income derived from property in Federal trust. Land held in trust for an Indian tribe or for an Indian individual may not be sold without prior approval of the Secretary of the Interior or his representative (the Bureau of Indian Affairs). Related restrictions limit the capacity of an Indian to contract with a private attorney and limit the heirship distribution of trust property. Many Americans erroneously believe that as wards of the Federal Government Indians must stay on

reservations[50] and that they receive gratutious payments from the Federal Government. Indians do not in fact receive payments merely because they are Indians. "Payments may be made to Indian tribes or individuals for loses which resulted from treaty violations...individuals may also receive government checks for income from their land and resources, but only because the assets are held in trust by the Secretary of the Interior and payment for the use of the Indian resources has been collected by the Federal Government."[51] Like other citizens, Indians may hold Federal, State and local office, are subject to the draft, may sue and be sued in State courts,[52] may enter into contracts, may own property and dispose of property (other than that held in trust) and, as stated before, pay taxes. The large number of Federal and State laws and provisions which in the past denied Indians political rights and public benefits have either been legislatively repealed, ruled invalid by the Judicial branch or remain unenforced.

50/ Although originally true, this has not been the case for decades.

51/ United States Department of the Interior, Bureau of Indian Affairs, May 1968.

52/ In Re Celestine, 114 Sed. 551 (1902).

53/ I.e., Federal laws and regulations prohibiting Indians from buying alcoholic beverages were repealed in 1953.